Supreme Court, U. S.
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No. 79-876

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL PAUL MCILVANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1979. A petition for rehearing was denied on November 19, 1979 (Pet. App. B). The pe-

tion for a writ of certiorari was filed on December 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admission of a co-defendant's extrajudicial statement at a joint trial violated petitioner's right to confrontation where that co-defendant testified at trial and was subject to cross-examination.

STATEMENT

After a joint jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendant Alfred Ruckstahl III were convicted of conspiracy to manufacture phencyclidine (PCP), in violation of 21 U.S.C. 846. Petitioner was sentenced to three years' imprisonment, to be followed by two years' special parole. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that in the fall of 1976 petitioner and co-conspirator Michael Thomas [1] agreed to manufacture phencyclidine and divide the expected $650,000 profit among themselves and co-defendant Ruckstahl, who had been recruited by petitioner as a chemist (I Tr. 7-9, 30). Petitioner prepared a list of needed chemicals and equipment and gave the list to Thomas, who was responsible for purchasing the items on the list (I Tr. 9-11, 30). Petitioner revised the list downward when it was determined that the total cost of the items on the original list was more than anticipated (I Tr. 15-16; III Tr. 127).

[1] Thomas was also charged with the conspiracy. Prior to petitioner's trial, Thomas pleaded guilty to attempted manufacture of phencyclidine (I Tr. 5-7). He testified for the government at petitioner's trial.

By mid-December 1976 Thomas had obtained all of the required chemicals and equipment and had stored them in his garage (I Tr. 33). Petitioner and Thomas then moved the chemicals and equipment to petitioner's residence, where the laboratory was set up (I Tr. 35-37). Thereafter petitioner told Thomas that the chemical process had begun but that a motor had malfunctioned and several boxes of glassware were broken (I Tr. 37-38). Petitioner gave Thomas the motor and broken glassware, and Thomas exchanged them at the place of purchase.[2] Thomas delivered the replacement items to petitioner's home. Finding no one there, he left the items on the porch. As he departed, Thomas encountered Ruckstahl, who suggested that the replacement items be transferred to Ruckstahl's house. Thomas and Ruckstahl performed that transfer (I Tr. 38-40).

Shortly before Christmas petitioner and Thomas, believing that they were under surveillance, decided to move the chemicals, equipment and some intermediate product to Thomas's house. After this trans-

[2] Petitioner's and Ruckstahl's fingerprints were found on the malfunctioning equipment that Thomas had returned to the chemical company for replacement (II Tr. 18; III Tr. 108-109).

fer, all three conspirators agreed to discontinue operations temporarily (I Tr. 41-43).

Petitioner and his co-defendants were arrested in mid-January 1977. Several containers of PCP precursor chemicals were found at petitioner's residence at the time of his arrest (III Tr. 9-13). Chemicals and laboratory equipment were also found during a search of Thomas's house pursuant to a warrant (II Tr. 26-32).

2. At trial co-defendant Ruckstahl, testifying in his own behalf, admitted that he had aided petitioner in setting up a laboratory but denied knowing what was to be produced. Ruckstahl claimed that he was to serve only as a bookkeeper (IV Tr. 28). According to Ruckstahl, he became suspicious in mid-December 1976, accused petitioner of engaging in illegal activities, and was threatened by petitioner (IV Tr. 36-37).

On cross-examination Ruckstahl was asked about a statement he made after his arrest to DEA Agent Richard Fling, indicating that he had told petitioner that he knew how to manufacture PCP (IV Tr. 111-112). Petitioner's counsel objected to the question, contending that it was improper under the rule established in *Bruton* v. *United States*, 391 U.S. 123 (1968), because it incriminated petitioner, who had not taken the witness stand. After a discussion out of the jury's presence the court ruled that it would permit the question to be asked (IV Tr. 112-121). The prosecutor informed petitioner's counsel that Agent Fling would be called to give rebuttal testimony concerning the statement in question (IV Tr. 116-117).

When the trial resumed, the prosecutor repeated the question; in response, Ruckstahl denied making such a statement to Agent Fling (IV Tr. 121). Petitioner did not cross-examine Ruckstahl. Thereafter, Fling testified in rebuttal that, following Ruckstahl's arrest, the latter stated that he had boasted to petitioner about his knowledge of the process for manufacturing PCP. Fling further testified that Ruckstahl admitted that petitioner had named Thomas as a person able to obtain the chemicals needed to make PCP, and that Ruckstahl had given petitioner and Thomas a list of necessary chemicals and equipment (IV Tr. 131-132). The jury was twice instructed that Ruckstahl's statement could not be considered against petitioner (IV Tr. 129-130; VI Tr. 80).

ARGUMENT

In this Court petitioner renews his claim (Pet. 6-9), rejected by both courts below, that the admission of co-defendant Ruckstahl's post-arrest statements violated the Confrontation Clause of the Sixth Amendment and was therefore error under *Bruton* v. *United States*, 391 U.S. 123 (1968). Contrary to petitioner's contention, no violation of the *Bruton* principle occurred in this case. In *Bruton*, this Court held that the admission in a joint trial of a non-testifying co-defendant's extrajudicial confession implicating the petitioner violated the latter's Sixth Amendment confrontation rights. The crux of *Bruton* lies in the

highly prejudicial impact of a co-defendant's confession on an individual who had no opportunity to confront the utterer. See *Parker* v. *Randolph*, No. 78-99 (May 29, 1979), slip op. 9. *Bruton* does not apply here because petitioner's co-defendant testified, and petitioner had ample opportunity for "full and effective" cross-examination as to the co-defendant's statements. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *California* v. *Green*, 399 U.S. 149, 158 (1970). In *Nelson*, as here, the co-defendant denied making the extrajudicial admission.

Petitioner urges, however, that adequate cross-examination of co-defendant Ruckstahl was foreclosed because Ruckstahl's statements were not admitted into evidence at the time he testified, and these statements were therefore not a subject for cross-examination. But the fact that Ruckstahl's statements were not admitted into evidence until Fling testified to them did not deprive petitioner of the right to explore the statements fully during cross-examination of Ruckstahl. The government's file had been opened to petitioner's counsel well before trial (Government's Answer to Defendant's Motion to Quash, paragraph 6), and counsel had thus long been aware of the contents of Ruckstahl's post-arrest statements.[3]

[3] In addition to the fact that Ruckstahl's statements were available to petitioner's counsel from the prosecutor's files, we are informed by the prosecutor that a copy of Fling's report containing Ruckstahl's post-arrest statements was provided to petitioner's counsel prior to trial as part of the Jencks Act material provided to the defendants. The trial transcript contains no reference to disclosure of Jencks Act material.

Additionally, even if counsel was not fully aware of the contents of Ruckstahl's statements, he could easily have requested disclosure of them when Ruckstahl testified, as provided by Fed. R. Evid. 613(a).

Thus, there is no plausible basis for petitioner's claim that he could not have fully cross-examined Ruckstahl as to his statement at the time he testified. Indeed, in order to allow thorough cross-examination, the prosecutor made it abundantly clear during Ruckstahl's testimony that Fling would testify as to Ruckstahl's statements.

In sum, nothing prevented petitioner from asking Ruckstahl on cross-examination whether he had ever made the statements to petitioner that Ruckstahl allegedly told Agent Fling he had made. Under *Nelson* v. *O'Neil*, *supra*, there was no constitutional violation. *United States* v. *Leonard*, 494 F.2d 955, 964 (D.C. Cir. 1974); *United States* v. *Hawk Wing*, 459 F.2d 428, 430 (8th Cir. 1972).[4]

In sum, petitioner had ample opportunity to cross-examine his co-defendant fully and effectively as to the extrajudicial statements. Petitioner was not deprived of the right to confront witnesses against him.

[4] *Leonard* and *Hawk Wing*, like the present case, involved extrajudicial statements that the testifying co-defendant denied having made, and that were then introduced by the government on rebuttal. In neither case was it suggested that cross-examination could be effective only after the extrajudicial statement is introduced into evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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